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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. —

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MARINE ENGINEERS BENEFICIAL ASSOCIATION,
No. 13

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on April 3, 1953 (R. 56–57), which set aside an order of the Board issued with their consent against the United Marine Division, Local 333–A, International Longshoremen's Association, AFL, and William V. Bradley, vice president, International Longshoremen's Association, AFL.

OPINIONS BELOW

The opinion of the court below (R. 50–56) is reported at 202 F. 2d 546. The proceedings before the Board are unreported.

JURISDICTION

The judgment of the court below was entered on April 3, 1953 (R. 56–57). The jurisdiction of this

Court is invoked under 28 U. S. C. 1254 and Section 10 (e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Following issuance of a complaint alleging the commission of unfair labor practices, the National Labor Relations Board's General Counsel and the alleged offenders agreed to a settlement which was approved by the Board and on the basis of which the Board entered an order prescribing measures to remedy the practices alleged. The party who had filed the charge leading to the complaint objected to the order, demanding that, unless a settlement could be effected on terms it deemed acceptable, the Board should hold a hearing and resolve the issues only after a contested proceeding. The question presented is whether, after a complaint has issued, the charging party's objection precludes the Board from conclusively terminating the case by an order entered pursuant to a settlement with the alleged offender.

STATUTES AND RULES INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. 1001, *et seq.*), and of the Board's Rules and Statements of Procedure are set forth in Appendix A, *infra*, pp. 24–32.

STATEMENT

A charge was filed on December 31, 1951 (R. 1a–4a) (and amended on January 30, 1952, R. 5a–8a),

by Marine Engineers Beneficial Association No. 13, hereafter called M. E. B. A., against United Marine Division, Local 333–A, International Longshoremen's Association, AFL, and William V. Bradley, vice president, International Longshoremen's Association, AFL, hereafter collectively called I. L. A. On April 21, 1952, on the basis of this charge, the Regional Director of the Board's Fourth Regional Office issued a complaint alleging that I. L. A. had violated Section 8 (b) (4) (A) of the Act (R. 9a–12a), insofar as that section makes it an unfair labor practice for a labor organization or its agents:

> To engage in, or to induce or encourage the employees of any employer to engage in, a strike * * * where an object thereof is:
>
> (A) forcing or requiring any employer * * * to join any labor * * * organization * * *.

The allegations of the complaint may be summarized as follows: Beginning on October 2, 1951, I. L. A. had demanded of various tugboat companies or operators in the Philadelphia area that they enter into a collective bargaining agreement with I. L. A. which would require the licensed engineers employed by the tugboat owners to join the I. L. A. (R. 10a). On and after December 16, 1951, I. L. A. induced and encouraged employees of the operators to strike in order to force the operators to enter into such an agreement (R. 10a–11a). As a result of this inducement to strike, on December 26, 1951, the operators signed a contract with I. L. A. requiring the licensed engineers to join that organization (R. 11a). The

complaint alleged further that the licensed engineers, by virtue of their status as ship's officers and agents of the operators, were "employers" within the meaning of Sections 2 (2) and 8 (b) (4) (A) of the Act (R. 10a), and hence that I. L. A. had violated Section 8 (b) (4) (A) by inducing employees of the operators to strike in the course of their employment for the purpose of requiring employers (*i. e.*, licensed engineers) to join a labor organization (R. 11a).

On May 6, 1952, after issuance of the complaint, a stipulation was executed between I. L. A. and counsel for the General Counsel of the Board, with the assent of the tugboat operators, incorporating the terms of a settlement of the complaint, subject to Board approval (R. 13a–21a). Under the settlement I. L. A., without admitting the commission of the unfair labor practices alleged in the complaint, consented to the entry of a Board order and an enforcement decree in an appropriate Court of Appeals. The order provides that I. L. A. shall not: (1) engage in or induce the employees of the operators to engage in a strike, where an object thereof is either (a) to force or require the engineers to join the I. L. A., or (b) to force or require the operators to comply with the provisions of the December 26, 1951, agreement insofar as it applies to engineers; (2) enforce or give effect to the agreement insofar as it applies to engineers; or (3) demand recognition as exclusive representative of the engineers, or negotiate for such recognition, for a period of sixty days from the date of the Board's order. Affirmatively, the order re-

quires I. L. A. to post notices reciting in detail that it will not engage in the conduct proscribed by the order.

While the settlement was pending before the Board for its approval, M. E. B. A. filed a statement of objections to the settlement, urging that the "proposed stipulation does not provide the remedy which the charging party believes would have been accorded by the Board" after a contested proceeding (R. 22a). M. E. B. A. suggested three amendments to the order: (1) prohibit I. L. A. from requesting or demanding an agreement with the tugboat operators requiring the licensed engineers to join the I. L. A. as a condition of employment (R. 22a–24a, 28a); (2) rescind and nullify from its inception the agreement between the I. L. A. and the tugboat operators insofar as it applies to the licensed engineers (R. 24a–25a, 28a); and (3) require I. L. A. to mail to each licensed engineer a letter stating that he is not required to join that organization (R. 25a, 28a–29a, 30a).[1] M. E. B. A. urged the Board not to approve the settlement, "but instead return the case to the General Counsel with leave to him" either to settle the case on M. E. B. A.'s terms or to proceed to prosecute the complaint (R. 22a).

The Board considered and rejected M. E. B. A.'s objections to the settlement and on August 15, 1952, entered the order as agreed upon by I. L. A. and the

[1] In the court below, M. E. B. A. abandoned its claim concerning the mailing of individual letters to the licensed engineers.

General Counsel, and assented to by the tugboat operators, "because of its conclusion" that acceptance of the settlement "will effectuate the policies of the Act" (R. 35a, n. 1, 34a–40a).[2] On September 24, 1952, M. E. B. A. filed its petition for review in the court below, requesting that the court set aside the Board's consent order and remand the case to the Board with "directions to the Board to proceed with a hearing upon the complaint * * * with leave to the Board not to hold a hearing if it or its General Counsel is able to secure a new stipulation" in keeping with M. E. B. A.'s views (R. 41, 46).

In its decision of March 10, 1953, the court below set aside the Board's order and remanded the case to the Board for further proceedings (R. 50, 56). While agreeing that the Board may effectuate a conclusive settlement without the charging party's assent before the issuance of a complaint or after the entry of a final order (R. 52, n. 3), the court held that the Board is without power to do so in the intermediate procedural stage after issuance of the complaint. At that juncture, the court held, the charging party "does have some standing," and unless it consents to a settlement, it is "entitled to a hearing" so it can make a record resulting in an order capable of "court review on the questions of fact and on the

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[2] Shortly thereafter the Board filed a petition in the court below for entry of a consent decree enforcing this order. *N. L. R. B.* v. *United Marine Division, Local 333–A, I. L. A., A. F. L., et al., No. 10,887.* The court below, on motion of the Board, has postponed consideration of this petition until disposition of the instant proceeding.

questions of law" (R. 55). The court based its conclusion on its views concerning (1) the Board's rules and practice (R. 53); (2) the right to obtain judicial review of a final order accorded by Section 10 (f) of the National Labor Relations Act to a person aggrieved by a denial of relief (R. 53); and (3) the requirements of Sections 5 (b) and 6 (a) of the Administrative Procedure Act (R. 54-55).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that an objection of the charging party precludes the Board from effectuating a conclusive settlement after a complaint has been issued.

2. In failing to deny the petition to review and set aside the Board's order entered with the consent of the alleged offenders.

REASONS FOR GRANTING THE WRIT

In issue is the question whether, after a complaint has been brought alleging the commission of unfair labor practices, the Board and the alleged offender may enter into a settlement of the complaint conclusively terminating the case if the party charging the commission of the unfair labor practices withholds consent to the settlement. Under the decision below, unless the party who filed the charge consents, the Board may not approve a settlement with the alleged offender and enter a final order based upon such settlement, but must hold a hearing and prosecute the complaint as if there had been no

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agreement to settle. The decision rests upon the premise of the court below (R. 55) that a Board order resulting from a settlement is reviewable in court at the instance of the charging party, and that there must therefore be a record upon which such review can be based.

As the court below observed (R. 51), the question is one "of obvious importance" and "one which is not settled so far as the parties or we have been able to discover." Recognizing that settlement is the "life-blood of the administrative process" (Final Report, Atty. Gen. Comm. Admin. Proc., Sen. Doc. No. 8, 77th Cong., 1st Sess., p. 35), the Board "has from the very beginning encouraged compromises and settlements" (*Wallace Corp.* v. *National Labor Relations Board*, 323 U. S. 248, 253–254; and see *Poole Foundry & Machine Co.* v. *National Labor Relations Board*, 192 F. 2d 740, 742 (C. A. 4), certiorari denied, 342 U. S. 954). Sharply curtailing the Board's power in this significant area, the decision below rests, in our view, upon misconstruction of both the National Labor Relations Act and the Administrative Procedure Act. We submit that there is need for review by this Court.

1. It is necessary at the outset to describe (a) the types of settlement evolved by the Board, (b) the Board's practice of making settlements without the assent of the charging party, and (c) the considerations which go to determining the acceptability of a settlement.

a. The Board employs two broad types of settlement, called "formal" and "informal" adjustments. A formal adjustment, like the one in this case, is one in which the Board enters an order with the alleged offender's consent; depending on the agreement reached, it may or may not provide for the entry of a consent decree enforcing the order. In an informal adjustment, on the other hand, the settlement agreement is not incorporated in an order, but is reduced to writing, and the case is closed on compliance with the terms of the settlement. "Since a stipulation for a Board order or consent decree is permitted only if a complaint has issued, it is necessary where a formal order is agreed upon by the parties, to arrange for the authorization and issuance of a *pro forma* complaint before Board approval is given to the settlement." Mon. Atty. Gen. Comm. Admin. Proc., N. L. R. B., S. Doc. No. 10, Part 5, 77th Cong., 1st Sess., p. 8, n. 33. "After the complaint has been issued, the respondent, upon admitting only the facts of his business from which the Board may find that he is engaged in interstate commerce, may consent to the entry of an order specifying the practices which he agrees to cease and the affirmative action which he agrees to take. He is not required to admit any facts concerning the practices alleged in the complaint. The Board then makes findings that he is engaged in interstate commerce, that a complaint has been issued, and that the stipulation * * * has been made; the Board thereupon issues the order agreed upon in

the stipulation and no further findings concerning the facts or the alleged violations are made." Final Report, Atty. Gen. Comm. Admin. Proc., Sen. Doc. No. 8, 77th Cong., 1st Sess., p. 42.

Each stage of an unfair labor practice proceeding, from the filing of a charge through the final step of negotiating compliance with the terms of a contempt judgment, presents an occasion for consent adjustment. Extraordinary circumstances aside, no complaint issues except after exploration of the possibility of settlement, and even after issuance of the complaint, "the parties * * * have full opportunity at every stage to dispose of the case by amicable adjustment * * *." [3] At any procedural stage the adjustment reached may be either formal or informal. If a formal adjustment is agreed upon before a complaint has been brought, a *pro forma* complaint is issued to provide the jurisdictional basis for the entry of the consent order (as well as an enforcing decree when the settlement calls for it). If an informal adjustment is agreed upon after a complaint has been issued, the Regional Director of the Board who brought the complaint withdraws it as part of the settlement.

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[3] N. L. R. B., Statements of Procedure, Sec. 101.7, 101.9, in 29 CFR 41–42 (1949). For reported cases in which settlement was effected at a late stage in the proceeding, see e. g. *Fickett-Brown Mfg. Co.*, 52 N. L. R. B. 32, enforced, 140 F. 2d 883 (C. A. 5) (after hearing); *Fred Rueping Leather Co.*, 24 N. L. R. B. 1086 (after trial examiner's report); *Pittsburgh Plate Glass Co.*, 8 N. L. R. B. 1210, noted in 313 U. S. 146, 159–160 (after hearing).

b. The consent of the charging party to a settlement is uniformly sought but not always obtained. See Mon. Atty. Gen. Comm. Admin. Proc., N. L. R. B., S. Doc. No. 10, Part 5, 77th Cong., 1st Sess., p. 7, n. 29. Where the charging party's assent cannot be obtained, but the Board nevertheless is of the view that the settlement best conduces to effectuate the policies of the Act, the settlement is taken.

This has been the Board's practice for at least a decade. It is recorded in the Board's Field Manual for January 15, 1944, codifying the agency's policies, practices, and procedures for the guidance of its staff. With respect to formal adjustments, while stating that the "parties to the stipulation must include the respondent, the charging party, the Board's attorney or Field Examiner or both, and any intervenor," the manual expressly notes that (Appendix B, *infra*, p. 35, n. 1):

> In exceptional situations, a formal settlement may be concluded *without* agreement of the charging party. In this event, adequate means must be afforded the charging party to make known its objections to the Board. [Emphasis supplied.]

The same is true of informal adjustments. While observing that the "employer and the charging union should ordinarily both be parties to the agreement," the manual states further that (Appendix B, *infra*, p. 35):

> However, it will be noted that a form (N.L.R.B. 283) is provided for use in those cases where the employer offers appropriate affirmative

> remedial action which the union is unwilling to accept. This form should be used sparingly and only after the Field Examiner has used every reasonable effort to persuade the union to accept the proferred compliance.

The form referred to was contained in Field Division Instruction No. 45, issued more than a year before, on December 18, 1942 (Appendix B, *infra*, pp. 36–37). The practice of disposing "of cases that are settled informally by agreements between the Regional Director and respondent where the charging party is unwilling to be a party to the settlement" was earlier mentioned in a memorandum of May 29, 1941, in a context indicating its settled usage (Appendix B, *infra*, pp. 41–42). Even before then individual Board members had occasion to explain that settlements without the consent of the charging party were necessary to effectuation of the Act's policies.[4] In short, the practice of taking settle-

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[4] Former Board Chairman J. Warren Madden, now on the bench of the United States Court of Claims, early explained in reply to an objection that charging unions were obliged to accept compromises arranged by the Board: "* * * there [is] no way in which an administrative agency could be compelled to litigate against its own judgment. The word of the Labor Board in such matters * * * is final." 5 L. R. R. M. 1163, 1166 (1939–1940). Another former Board member explained in 1940 that:

"It must be borne in mind that the processes of the Act were not designed to adjudicate private rights but to establish public policy. In the belief that substantial compliance with the purposes of the Act and a substantial opening up of the channels of self-organization, free from the employer's interference, has been accomplished by a particular settlement, the Board and its agents are fully warranted, we feel, in making settlements which may represent to indi-

ments over the objection of a charging party is no current innovation but is long-standing with the Board.[5]

c. Underlying the determination whether to accept the terms of settlement, despite the charging party's refusal to assent, is a balance of many factors to be weighed in the scales of the public interest in advancing the policies of the Act. For example, judgment must be exercised to determine whether the charging party's objections stem more from its zeal than from the inadequacy of the settlement, and whether on that account the charging party is seeking more than the circumstances fairly warrant; whether lesser immediate relief by settlement will do more to redress and prevent the unfair labor practices than greater relief delayed by litigation; whether measuring the risks of protracted litigation against its advantages, including estimates of the sufficiency of proof and the soundness of the legal position, the balance pre-

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viduals a diminution of what they might receive if the case were litigated" (address before Harvard Law School students, March 8, 1940, N. L. R. B. Release No. R.–2728).

[5] When the court below stated that the early "policy of the Board" had not been established by evidence that was "conclusive" (R. 55), it did so without benefit of the documents mentioned in the preceding paragraph, only the statement of Board Chairman Madden having been called to its attention (see preceding note). The court was influenced by the description of Board settlement procedures contained in Rosenfarb, *The National Labor Policy and How It Works*, pp. 486, 518, published in 1940, which the court read to indicate that the Board "uniformly" obtains the charging party's assent (R. 54). The author's description, if not incomplete as of 1940, is certainly incomplete as of a few years later.

ponderates in favor of adjustment over contest; and whether evaluating the sufficiency of the settlement in the light of the demands on the agency's overall capacity, limited budget and personnel are better devoted to other cases. See Mon. Atty. Gen. Rep. Admin. Proc., N. L. R. B., S. Doc. No. 10, Part 5, 77th Cong., 1st Sess., p. 7, n. 30.

2. The court below holds that, in the intermediate procedural stage after issuance of the complaint and before entry of a final order, no settlement may be reached by the Board with the alleged offender over the objections of the charging party. This means that no formal adjustment can ever be effectuated without the charging party's assent because the indispensable procedural prerequisite for such an adjustment is the issuance of a complaint. It seems to mean, moreover—on the view of the court below (R. 55) that once a complaint is issued the charging party "is entitled to have a chance to be heard"—that not even an *informal* adjustment is possible in the absence of the charging party's consent after the issuance of a complaint. These limitations carve a serious inroad into effective settlement practice.

During the calendar year ending December 31, 1952, of a total of 894 informal adjustments made *before* complaint, 76 were unilateral (*i. e.*, effected without the consent of the charging party). During the same period, of a total of 153 adjustments *after* complaint, 11 were unilateral. Of these post-complaint adjustments, 81 were formal and 72 were informal; of the formal adjustments, 6 were unilateral,

and of the informal adjustments (involving withdrawal of the complaint by the Regional Director), 5 were unilateral.[6]

Considering only these figures, preclusion of unilateral post-complaint adjustments constitutes a substantial impairment of the Board's settlement practice. However, more significant than the past frequency of such settlements is the potentiality for seriously curtailing the future rate of post-complaint adjustments once charging parties learn that they may block a settlement by their naked veto of it. For the decision below means not merely that a settlement could be prevented when there is a reasonable difference of opinion between the agency and the

[6] During this period, since the agency closed a total of 5,399 cases, the adjustments constituted about 20 percent of the total. When to these adjustments, representing redress secured on meritorious charges, there is added the 2,670 cases in which the agency induced voluntary withdrawal of baseless charges, the rate increases to about 70 percent. An additional 1,227 charges, or about 23 percent of the total cases, were dismissed as without merit before complaint, with the result that only about 7 percent of all the charges filed culminated in a final order of the Board entered after a fully contested proceeding.

This summary was compiled from statistics furnished by the Board's Administrative Statistics Branch as supplemented by the results of a questionnaire addressed to the Board's Regional Directors. The estimate given by the Board to the court below, "that 5 percent of the settlements are effected over the objections of the charging party" (R. 51), proves to have been conservative, the actual overall figure being better than 7 percent. For comparable figures for the fiscal year ending June 30, 1951, but not including the rate of unilateral settlement, see N. L. R. B., *Sixteenth Annual Report*, p. 299.

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charging party; the settlement could not be effectuated no matter how unreasonable the charging party might be. Past experience indicates that a charging party's consent is not infrequently withheld for no better reasons than personal pique, arbitrary attitudes, motives of vengeance, or the desire to use the hearing as a forum for airing grievances and obtaining prestige-enhancing publicity.

To say, therefore, that the mere objection by the charging party to a post-complaint adjustment without more suffices to block the settlement is to say that the Act makes the judgment of the private complainant, preoccupied with serving his own interests, superior to the administrative judgment, based on "disinterested, public interest standards and expertness," [7] in determining the acceptability and timing of a settlement. There is, we submit, no warrant for superseding administrative control in this field.

3. a. A view of the scheme of the National Labor Relations Act as an integrated whole requires the conclusion that the charging party's consent to a settlement is unnecessary at any stage. The court below agreed that *before* the issuance of a complaint the Board may effectuate a settlement without the charging party's assent, for "the Board does not have to issue a complaint except in the exercise of its sound discretion, and * * * its discretion in this respect is not subject to court review" (R. 52).

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[7] *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U. S. 743, 751.

The court likewise agrees that, after the Board enters a final order in a contested proceeding, if the Board "decides against enforcement, or decides to negotiate a compromise rather than strict compliance, the decision is not generally reviewable" (R. 52, n. 3). Yet the court holds that the charging party has standing to block a settlement after issuance of the complaint despite his incapacity to do so either before the issuance of the complaint or after the entry of a final order.

There is no basis for such a distinction. From the standpoint of the charging party, a settlement reached before the issuance of a complaint or after the entry of a contested order may be just as unsatisfactory as a settlement concluded after the issuance of a complaint. Since the charging party cannot contest the settlement at the inception or the conclusion of the proceeding, there is no reason for supposing that the Act accords him greater standing in midstream, for his interest in the outcome is identical throughout.

The court below finds "quite a little, though not overwhelming, proof of the correctness" of its holding "in the practice of the Board itself. Its rules and regulations permit the charging party to be listed as a party to the proceedings from the outset instead of relegating him to intervention" (R. 53), and should a case be noticed for hearing, the Board's rules confer on a charging party "the right to appear * * *, to call, examine and cross-examine witnesses, and to

introduce into the record documentary evidence" (R. 53, n. 5).

But this analysis of the Board's practice overlooks the critical fact that this very practice has uniformly denied a charging party the power to prevent a settlement by withholding his consent. In the evolution of litigation practices, from its first through its most recent rules, the Board has, it is true, designated the person filing charges a "party" to the proceeding and accorded him full participation at the hearing of a contested complaint.[8] At the same time, however, in the evolution of settlement practices, the Board has not regarded the consent of the charging party as necessary to the effectuation of a settlement at any stage (*supra*, pp. 11-13). As to settlement, the Board's rules confer on a charging party only an "opportunity to submit * * * facts, arguments, offers of settlement, or proposals of adjustment."[9]

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[8] N. L. R. B., Rules and Regulations, Series 1, Art. II, Secs. 5 and 24, Sept. 14, 1935; *Id.*, as amended, Secs. 5 and 25, April 27, 1936; N. L. R. B., Rules and Regulations, Series 2, Secs. 5 and 25, July 14, 1939; *Id.*, as amended, March 13, 1940, April 22, 1941, Sept. 6, 1941, Oct. 28, 1942; N. L. R. B., Rules and Regulations, Series 3, Secs. 5 and 25, Nov. 26, 1942; *Id.*, as amended, July 12, 1944; N. L. R. B., Rules and Regulations, Series 4, Secs. 203.11, 203.31, Sept. 11, 1946; N. L. R. B., Rules and Regulations, Series 5, Secs. 203.8, 203.38, Aug. 22, 1947; *Id.*, as amended, Aug. 18, 1948; N. L. R. B., Rules and Regulations, Series 6, Secs. 102.8, 102.38, March 1, 1951; *Id.*, as amended, June 3, 1952.

[9] N. L. R. B., Rules and Regulations, Series 6, as amended, Sec. 102.51, June 3, 1952, in 29 CFR 78 (1952 Supp.); N. L. R. B., Statements of Procedure, Secs. 101.7, 101.9, June 3, 1952, in 29 CFR 41–42.

In a word, the Board's practice, instead of supporting the decision below, is inconsistent with it.

Furthermore, the statute itself negates the inference drawn by the court below from the fact that under the Board's rules a charging party may participate in the hearing of a contested complaint. According to Section 10 (b) of the NLRA only the person against whom the complaint runs "shall have the right to file an answer to the * * * complaint and to appear * * * and give testimony at the place and time fixed in the complaint." As to all others, including the charging party, "in the discretion of the * * * Board, any other person may be allowed to intervene in the said proceeding and to present testimony."[10] Consequently, a charging party participates in a hearing by leave of the Board in the exercise of its discretion, and not as of right. It by no means follows from this permissive participation that the charging party has an interest requiring his consent to a settlement. Cf. *Moffat Tunnel League* v. *United States*, 289 U. S. 113, 119–120. Nor does the mere fact that a person has filed a charge indicate that he has any interest, for "Anyone can file a charge" (*Kansas Milling Co.* v. *National Labor Relations Board*, 185 F. 2d 413, 415 (C. A. 10)), there being no "limitation on the classes of persons"

[10] See *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 362–363; *Oughton* v. *National Labor Relations Board*, 118 F. 2d 486, 495–496 (C. A. 3), certiorari denied, 315 U. S. 797; *Semi-Steel Casting Co.* v. *National Labor Relations Board*, 160 F. 2d 388, 393 (C. A. 8), certiorari denied, 332 U. S. 758.

competent to file charges with the Board. *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9, 17.

As additional grounds for its decision, the court below reasons that under Section 10 (f) of the NLRA "Any person aggrieved by a final order of the Board * * * denying in whole or in part the relief sought may obtain a review of such order"; that judicial review can be exercised only on the basis of a record made in a contested proceeding; and that a settlement of the complaint, since it is effectuated without such a record, deprives the nonassenting charging party as a person aggrieved of the means to contest the adequacy of the remedy (R. 53).

The emphasis placed on the availability of judicial review of the merits of a final order entered after a contested proceeding is misplaced. What is significant, as Section 10 as a whole makes clear, is that Congress limited such review to an order based upon and confined to the facts spread on the record of a contested proceeding, a situation where there is no impediment to judicial supervision and little reason to withhold it. But it is quite another thing to infer that, because no other order is susceptible to judicial review, Congress intended to compel the agency to pursue only that course which would culminate in a reviewable order. When the agency decides to accept a settlement instead of prosecuting the complaint it brought, it exercises the same administrative judgment—extra-judicial in character—which obtains when it decides to accept a settlement rather

than to issue a complaint in the first instance or to enforce a final order in the last instance. And the same reasons apply at each stage for finality of the administrative settlement. The fact that a formal settlement, which necessarily follows issuance of a complaint, is embodied in an "order" affords no ground for singling out this single type of compromise as being subject to the control of the charging party.

b. Without elaboration the court below holds, finally, that the provisions of Section 5 (b) and 6 (a) of the Administrative Procedure Act (APA) "are in point" (R. 54).

Paraphrasing the language of Section 5 (b), the court below evidently reads this provision to mean that when "the parties are unable * * * to determine * * * [the] controversy by consent," it is obligatory for the Board to give the person filing the charge, as one of the "*interested parties*," an opportunity for "hearing and decision upon notice * * *." But the court overlooks the definition of the term "party" contained in Section 2 (b) of the APA.

Section 2 (b) of the APA distinguishes between those persons who are "entitled *as of right* to be admitted as a party" and those who are "named or admitted as a party" in the agency's discretion. The participation of the latter class in any agency proceeding may be restricted to "limited purposes." After distinguishing between participation "as of right" and permissive participation, the APA goes no further. It provides no answer to the question whether and to what extent a person is a party "as of

right"; on this issue the basic statute under which the agency operates controls. Under the NLRA, as we have shown (*supra*, pp. 16–21), a person filing a charge is not "entitled as of right to be admitted as a party." Hence, his status as a party falls within the alternative classification specified by Section 2 (b) of the APA. That is, he is within the class "named or admitted as a party" by the agency, and his participation may therefore be restricted by the agency to "limited purposes." This being so, the Board may properly confine a charging party's participation in settlement to the "limited purposes" of being heard on the settlement without conditioning its effectuation on obtaining the charging party's consent.

The part of Section 6 (a) which the court below invokes provides that:

> Every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding.

The right to "appear" connotes no more than the opportunity to be heard. Such an opportunity is invariably accorded a charging party before a settlement is finally taken over his objection. To appear, however, does not mean to prevail, which is the effect of giving the charging party the final say on the acceptability of a post-complaint settlement.

CONCLUSION

For these reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

ROBERT L. STERN,
Acting Solicitor General.

GEORGE J. BOTT,
General Counsel,
National Labor Relations Board.

JUNE 1953.

APPENDIX A

1. The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. V, 151, *et seq.*), are as follows:

> [SEC. 8] (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> * * * * *
>
> (4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization * * *
>
> * * * * *
>
> SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce.
>
> * * * * *
>
> (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint * * *. Any such complaint may

be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. * * *

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * * If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. * * * In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served

on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the

Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the

United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact it supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

2. The relevant provisions of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. § 1001, *et seq.*) are as follows:

SEC 2. As used in this Act—

* * * * *

(b) *Person and party.*—"Person" includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies. "Party" includes any person or agency named or admit-

ted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding; but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes.

* * * * *

[SEC. 5] (b) *Procedure.*—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8.

* * * * *

SEC. 6. Except as otherwise provided in this Act—

(a) *Appearance.*—Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. Every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding. So far as the orderly conduct of public business permits, any interested person may appear before any agency or its responsible officers or employees for the presentation, adjustment, or determination of any issue, request, or controversy in any proceeding (interlocutory, summary, or otherwise) or in connection with any agency function. * * *.

3. The pertinent provisions of the Board's Rules and Regulations, Series 6, in effect at the times involved in this proceeding, are as follows:

> SEC. 102.8 *Party.*—The term "party" as used herein shall mean the regional director in whose region the proceeding is pending, and any person named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any Board proceeding, including, without limitation, any person filing a charge or petition under the act, any person named as respondent, as employer, or as party to a contract in any proceeding under the act, and any labor organization alleged to be dominated, assisted, or supported in violation of section 8 (a) (1) or 8 (a) (2) of the act; but nothing herein shall be construed to prevent the Board or its designated agent from limiting any party to participate in the proceedings to the extent of his interest only.
>
> * * * * *
>
> SEC. 102.38 *Rights of parties.*—Any party shall have the right to appear at such hearing in person, by counsel, or by other representative, to call, examine and cross-examine witnesses, and to introduce into the record documentary or other evidence, except that the participation of any party shall be limited to the extent permitted by the trial examiner, and provided further that documentary evidence shall be submitted in duplicate.
>
> * * * * *
>
> SEC. 102.51 *Settlement or adjustment of issues.*—At any stage of a proceeding prior to hearing, where time, the nature of the proceeding, and the public interest permit, all interested parties shall have opportunity to submit to the regional director with whom the

charge was filed, for consideration, facts, arguments, offers of settlement, or proposals of adjustment.

* * * * *

4. The pertinent provisions of the Board's Statements of Procedure, in effect at the times involved in this proceeding, are as follows:

SEC. 101.7 *Settlements.*—Before any complaint is issued or other formal action taken, the regional director affords an opportunity to all parties for the submission and consideration of facts, argument, offers of settlement or proposals of adjustment, except where time, the nature of the proceeding, and the public interest do not permit. Normally prehearing conferences are held, the principal purpose of which is to discuss and explore such submissions and proposals of adjustment. The regional office provides Board-prepared forms for such settlement agreements, as well as printed notices for posting by the respondent. These agreements, which are subject to the approval of the regional director, provide for the withdrawal of the charge by the complainant at such time as the respondent has complied with the terms of the settlement agreement. Proof of such compliance is obtained by the regional director before the case is closed. If the respondent fails to perform his obligations under the informal agreement, the regional director may determine to institute formal proceedings.

* * * * *

SEC. 101.9 *Settlement after issuance of complaint.*—(*a*) Even though formal proceedings have begun, the parties again have full opportunity at every stage to dispose of the case by amicable adjustment and in compliance with the law. Thus, after the complaint has been issued and a hearing scheduled or even

begun, the attorney in charge of the case and the regional director afford all parties every opportunity for the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment, except where time, the nature of the proceeding, and the public interest do not permit.

(*b*) All settlement stipulations which provide for the entry of an order by the Board are subject to the approval of the Board in Washington. If the settlement provides for the entry of an order by the Board, the parties agree to waive their right to hearing and agree further that the Board may issue an order requiring the respondent to take action appropriate to the terms of the adjustment. Usually the settlement stipulation also contains the respondent's consent to the Board's application for the entry of a decree by the appropriate circuit court of appeals enforcing the Board's order.

(*c*) In the event the respondent fails to comply with the terms of a settlement stipulation, upon which a Board order and court decree are based, the Board may petition that court to adjudge the respondent in contempt. If the respondent refuses to comply with the terms of a stipulation settlement providing solely for the entry of a Board order, the Board may petition the court for enforcement of its order, pursuant to section 10 of the National Labor Relations Act.

APPENDIX B

1. Excerpt from N. L. R. B. Manual of practices, procedures, and policies for the guidance of the Board's staff, dated January 15, 1944:

TYPES OF ADJUSTMENT

Definitions.—There are two types of adjustment, formal and informal. Formal adjustments are those which result in the issuance of either a Board order or a Board order and consent court decree. Informal adjustments are those which are effected through a simple agreement of the parties, approved by the Regional Director.

The majority of adjustments are of the informal type. If the employer's good faith and his intention not to engage in further violation of the Act seem clear, the informal type of adjustment is adequate.

The formal type of adjustment is to be preferred in 8 (2) cases and in other cases where the employer has wilfully and repeatedly engaged in flagrant violations of the Act. The decision as to whether to require a formal adjustment requires the exercise of discretion and judgment on the part of the regional staff.

It should be borne in mind that where there is nonperformance with the provisions of a consent decree, contempt action will ordinarily be in order. Where there is non-performance with a simple settlement agreement, the remedy lies in the issuance of a Complaint, in which event the case must be tried upon its merits—not on the matter of non-performance with the agreement.

Formal adjustments.—All formal adjustments require the issuance and service of a

complaint prior to or simultaneously with the signing of the settlement stipulation. The assistance of the regional legal staff should always be secured in this connection. As a minimum, the adjustment must provide for a stipulated Board order. However, a stipulated Board order standing by itself is of little value unless it is implemented by a Circuit Court consent decree. Not only does the consent decree provide a means for enforcement of the stipulated order, but it also serves as an effective deterrent to future violations. There are instances where respondent will only agree to a stipulated Board order. This problem may be met by respondent stipulating an admission of the allegations contained in the complaint or by admitting them in a formal answer to the complaint. Upon the basis of the admissions, the Board can then make findings of fact, with which to support the order. Supported by such findings, the order presumably could be enforced in the usual manner. In the absence of consent thereto, however, respondent would have the right to contest the entry of an enforcement decree. If consent to the decree is obtained as a part of the stipulation, no admission of unfair labor practices need be made by the respondent. The formal adjustment with a consent decree is usually the most desirable form of adjustment.

Stipulations for settlement providing for the entry of a Board order and Court decree must be expressly subject to Board approval and must contain (1) a statement of jurisdictional facts, (2) express consent to the entry of a Board order in specified terms, including waiver of rights to hearing and making of findings of fact and conclusions by the Board, and (3) express consent to the entry by the appropriate Circuit Court of Appeals of an en-

forcement order embodying the terms of the Board order, and preferably waiving further notice of the application therefor.

The parties to the stipulation must include the respondent, the charging party,[1] the Board's attorney or Field Examiner or both, and any intervenor.

Any stipulation providing for an affirmative order to bargain collectively should include a description of the bargaining unit agreed upon as being appropriate and an agreement that the labor organization involved represents a majority of the employees in the unit.

Informal adjustments.—An informal settlement may be made by use of a simple agreement without complaint, Board order, or decree. Such agreement should be reduced to writing, preferably on the appropriate standard form. These forms appear in Section 2 of the Forms Manual. The printed provisions on the forms represent the minimum settlement standards for the typical case. Additional provisions should be added where necessary to meet particular fact situations. The employer and the charging union should ordinarily both be parties to the agreement.[2] However, it will be noted that a form (N. L. R. B. 283) is provided for use in those cases where the employer offers appropriate affirmative remedial action which the union is unwilling to accept. This form should be used sparingly and only after the Field Examiner has used every reasonable effort to persuade the union to accept the proffered compliance.

[1] In exceptional situations, a formal settlement may be concluded without agreement of the charging party. In this event, adequate means must be afforded the charging party to make known its objections to the Board.

[2] In certain cases, such as collusive contract cases, other interested persons must also be made parties to the settlement.

Recommendation to accept adjustment.—If the Field Examiner feels that the employer's offer of settlement is consistent with the facts developed by the investigation, he should recommend acceptance of the offer. This recommendation should be in the form of a report, clearly setting forth a comprehensive account of the violation and the degree of relief being offered. Available evidence to support the charge should be summarized, concluding with the basis for the Field Examiner's recommendation. Ordinarily, no informal adjustment should be recommended which is not reduced to writing on the appropriate settlement form or its equivalent and which does not provide for the posting of appropriate notices for a period of at least 60 consecutive days.

2. Field Division Instruction No. 45:

DECEMBER 18, 1942.

To: All Regional Directors.
From: Oscar S. Smith, Director, Field Division.
Subject: Standard Settlement Agreements and Notices.

At the present time most regional offices are disposing of practically all adjusted cases by means of written settlement agreements. However, since each region has devised it own types and standards of agreements, there exists substantial divergence of practice. While some offices make use of printed or mimeographed settlement agreements, others use a standard model which is copied and altered to suit particular cases at the time of settlement. Furthermore, in addition to differences of settlement standards and types, there also exists material differences in the form and content of employer notices.

In implementing the Board's policy of uniform written settlements, a study has been made of most of the printed and model agreements now in use. Based on this study, a set of standard agreements and notices has been compiled combining the better features of all existing forms and types. The result achieved consists of settlement agreement forms, each of which is entirely contained on one page and requires a minimum of insertions. These standard agreements are generally self-explanatory. However, where action additional to that outlined in a particular form is to be taken as part of the settlement, it may be necessary to retype the agreement to include the additional provisions.

There has also been evolved a standardized set of employer notices. It is suggested that wherever possible these standard notices for posting be copied on the employer's letterhead. If the mineographed notice itself is used, it may be necessary to retype it in those instances where additional action is being taken, the description of which does not lend itself readily to inclusion in the standard form.

It will be noted that no standard agreement or notice to cover 8 (2) settlements is included since it is believed advisable to settle such cases on the basis of a consent decree in almost every instance.

There is attached herewith a set of these new agreements and notices and there will soon be sent to each regional office a small supply of this material. Should more sets be necessary, they may be obtained on request. These new forms should be used in settlement of all cases wherever applicable and practicable. Please submit comments after they have been given a fair trial.

NLRB–282

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

——— REGION

Case No. ——

IN THE MATTER OF

AND

SETTLEMENT AGREEMENT

It is hereby agreed by and between the undersigned labor organization, herein called the UNION, and the undersigned Employer, herein called the EMPLOYER, in settlement of the above matter, as follows:

I. *Notice:* The Employer will post immediately in conspicuous places in and about its plant and maintain for a period of at least sixty (60) consecutive days from the date of posting copies of the Notice to All Employees attached hereto and made a part hereof. The Employer will comply with all of the terms and provisions of said Notice.

II. *Notification of compliance:* The Employer and the Union will each notify the Regional Director in writing within five (5) days and again after sixty (60) days from the date of

approval of this Agreement what steps the Employer has taken to comply herewith.

III. *Back pay:* The Employer will make whole the employees named in Exhibit "A" attached here to and made a part hereof, in the amount set opposite their names.[1]

IV. *Withdrawal:* The Union does hereby ask leave of the Regional Director to withdraw the charge in the above matter, such withdrawal to become effective when the Regional Director is satisfied that the provisions of this Agreement have been carried out.

V. *Approval:* This Agreement is subject to the approval of the Regional Director. Upon his approval, and contingent upon compliance with the terms and provisions hereof, no further action shall be taken in this matter.

Board Agent.

Approved_____194__

Regional Director.

NATIONAL LABOR RELATIONS BOARD.

(Employer)

By _____

(Representative) (Title)

(Union)

(Representative) (Title)

[1] This section to be stricken if no back pay is involved in settlement.

NLRB—283

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

_____ REGION

Case No. _____

IN THE MATTER OF

AND

SETTLEMENT AGREEMENT

IT IS HEREBY AGREED BY and between the undersigned Employer, herein called the Employer, and the undersigned Agent for the National Labor Relations Board, in settlement of the above matter, as follows:

I. *Notice:* The Employer will post immediately in conspicuous places in and about its plant and maintain for a period of at least sixty (60) consecutive days from the date of posting, copies of the Notice To All Employees attached hereto and made a part hereof. The Employer will comply with all the terms and provisions of said Notice.

II. *Refusal to issue complaint:* Upon the basis of this Agreement, the undersigned Regional Director shall decline to issue a complaint herein. A review of such action may be obtained pursuant to Article II, Section 9, of the Rules and Regulations of the National Labor Relations Board if a request for same is filed within seven (7) days. This Agreement is contingent upon the said Board sustaining the Regional Director's action in the event of a review.

III. *Performance:* Performance by the Employer with the terms and provisions of this Agreement shall commence immediately upon receipt by the Employer of advice that no

review has been requested or that the said Board has sustained the Regional Director. The Employer will notify the Regional Director in writing within five (5) days and again after sixty (60) days from the receipt of such advice what steps the Employer has taken to comply herewith.

IV. *Back pay:* The Employer will make whole the employees named in Exhibit "A" attached hereto and made a part hereof, in the amount set opposite their names.[1]

V. *Approval:* This Agreement is subject to the approval of the Regional Director.

Approved_____194____

_____
Regional Director.

NATIONAL LABOR RELATIONS BOARD.

_____

By_____
(Representative) (Title)

_____
Agent.

NATIONAL LABOR RELATIONS BOARD.

[Succeeding irrelevant forms have been omitted.]

3. Memorandum on settlements.

NATIONAL LABOR RELATIONS BOARD,
Washington, D. C., MAY 29, 1941.

To: All Regional Directors.

From: G. L. Patterson, Director of Field Division.

Subject: Statement of cases.

This memorandum supplements M–689 of October 13, 1938, and M–689–a of October 25, 1940.

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[1] This section to be stricken if no back pay is involved in settlement.

Some confusion seems to have arisen in some regions as to how to dispose of cases that are settled informally by agreements between the Regional Director and respondent where the charging party is unwilling to be a party to the settlement. In such situations the usual letter refusing to issue complaint should be sent to the charging party. The settlement agreement signed by the Regional Director and the respondent should contain a provision that such letter is being sent and that the entire agreement is subject to any action the Board may take on an appeal, if filed. The letter to the charging party should, of course, contain the usual reference to the right of review provided for in Article II, Section 9, of the Rules and Regulations.

U. S. GOVERNMENT PRINTING OFFICE: 1958

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Office - Supreme Court,
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JUL 18 1953
HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

No. 126.

October Term, 1953.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

MARINE ENGINEERS BENEFICIAL ASSOCIATION, NO. 13.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR MARINE ENGINEERS BENEFICIAL ASSOCIATION, NO. 13, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

ABRAHAM E. FREEDMAN,
CLIFFORD D. O'BRIEN,
RUTH WEYAND,
Attorneys for Marine Engineers Beneficial Association, No. 13.

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IN THE

Supreme Court of the United States.

October Term, 1953.

No. 126.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

MARINE ENGINEERS BENEFICIAL ASSOCIATION,
No. 13.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR MARINE ENGINEERS BENEFICIAL ASSOCIATION NO. 13, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the court below (R. 50-56) is reported at 202 F. 2d 546. The decision and order of the National Labor Relations Board (R. 34a-40a) are unreported.

JURISDICTION.

The decree of the court below was entered on April 3, 1953 (R. 56-57). The petition for a writ of certiorari was filed on June 16, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 and under Section 10(e) and (f) of the National Labor Relations Act, as amended.

QUESTION PRESENTED.

Whether a party who files a charge of unfair labor practices with the National Labor Relations Board and secures the issuance of a complaint thereon, is deprived of rights accorded to it by the National Labor Relations Act, the Administrative Procedure Act and the Board's Rules and Regulations when the Board issues a final order denying in part the relief sought by the charging party, without holding any hearing or otherwise progressing the complaint through the usual procedural steps provided in the National Labor Relations Act and in the Rules and Regulations issued thereunder but rests its order solely on a stipulation entered into by the offending party and the Board's counsel over the objection of the charging party.

STATUTES AND RULES INVOLVED.

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 146, 29 U. S. C. Supp. V, 151, *et seq.*), of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. 1001, *et seq.*), and of the Board's Rules and Statements of Procedure are set forth in Appendix A, *infra*, pp. 23 *et seq.*

STATEMENT.

The proceedings before the National Labor Relations Board were instituted by the filing on January 2, 1952, by the Marine Engineers Beneficial Association, No. 13, hereinafter called M. E. B. A., of a charge of unfair labor practices against the United Marine Division, Local 333-A, International Longshoremen's Association, A. F. L., hereinafter called I. L. A., and against William V. Bradley (R. 1a-4a). The charge insofar as here material alleged as follows:

M. E. B. A. is an association composed of licensed marine engineers which is and has for the past thirty years been the exclusive collective bargaining representative of

the licensed marine engineers in the Port of Philadelphia (R. 2a). M. E. B. A. has in the past entered into yearly contracts with Taylor & Anderson, P. F. Martin, Inc., Independent Towing Co., Curtis Bay Towing Co., Sheridan Transportation Co. and L. B. Tucker and Sons, each of whom operates tugs in the Port of Philadelphia, said six companies jointly being hereinafter called the Operators (R. 2a). These contracts have fixed the compensation, hours and working conditions of the licensed marine engineers who man the tugs of said companies (R. 2a). The most recent of such contracts was in force up to December 31, 1951 (R. 2a).

Beginning on or about December 23, 1951, the I. L. A. and its agent, William V. Bradley, induced and encouraged the employees of the Operators, said employees being members of the I. L. A., to engage in a strike against the Operators, an object thereof being to force and require the Operators to cease doing business with M. E. B. A. and to enter into an exclusive collective bargaining agreement with the I. L. A. under the terms of which the I. L. A. would become the exclusive collective bargaining representative of the licensed marine engineers on all tugs of the Operators (R. 2a-3a). The I. L. A. is not the appropriate collective bargaining representative as its membership includes the unlicensed personnel who are supervised by the licensed marine engineers (R. 3a). Nevertheless the I. L. A. did on Decembr 26, 1951, by means of the threat of a strike, succeed in forcing the Operators to enter into such a contract with the I. L. A., which by its terms became effective January 1, 1952 (R. 3a).

The charge further alleged that by the acts therein described the I. L. A. and William V. Bradley had engaged and were engaging in unfair labor practices within the meaning of Section 8(b)(4)(A) of the National Labor Relations Act (R. 2a).

On January 30, 1952, M. E. B. A. filed an amended charge in which it alleged that the licensed marine engineers

were "employers" within the meaning of Sections 2(2) and 8(b)(4)(A) of the National Labor Relations Act because they are agents of the Operators for the purpose of supervising employees on the tugs of the Operators, and that the I. L. A. and William V. Bradley had violated Section 8(b)(4)(A) by inducing and encouraging the employees of the Operators to engage in a strike, an object of which was to force and require the licensed marine engineers to join the I. L. A. (R. 5a-6a). The amended charge further alleged that as a result of such unfair labor practice the Operators were forced and required to and did on December 26, 1951, sign a contract with the I. L. A., effective January 1, 1952, under the terms of which the licensed marine engineers were required to become members of the I. L. A. within thirty days or lose their position as agents of the Operators for the purpose of supervising the employees on the tugs of the Operators (R. 6a-7a).

On April 21, 1952, the Regional Director for the Fourth Region of the National Labor Relations Board, acting upon the charge and amended charge above described, issued a complaint against the I. L. A. and William V. Bradley (R. 9a-12a). The complaint insofar as here material alleged as follows:

The marine engineers on tugboats owned by the Operators, are licensed as engineer officers by the United States Coast Guard pursuant to law and are agents of the Operators in charge of the propulsion machinery of the tugboats and in command of the engine-room crews (R. 10a). By reason of their status as ships' officers and agents of the Operators, such engineers are "employers" within the meaning of Sections 2(2) and 8(b)(4)(A) of the Act (R. 10a).

From October 2, 1951 until December 26, 1951, the I. L. A. demanded that the Operators and the Tugboat Owners and Operators of the Port of Philadelphia, an association composed of the six named operators, which association is hereinafter referred to as the Association of Operators,

enter into a collective bargaining agreement with I. L. A., by the terms of which the licensed marine engineer officers employed by the Operators would be required as a condition of their employment to become members of I. L. A. within thirty days from the effective date thereof and to retain such membership during their employment as such engineer officers (R. 10a).

Beginning on December 16, 1951, I. L. A. by strike vote, orders, instructions, directions, appeals and other means induced and encouraged employees of the Operators and of other employers, to engage in a strike or concerted refusal in the course of their employment to perform services, an object thereof being to force or require the Operators and the Association of Operators to enter into the above described collective bargaining agreement and thereby to force or require the engineer officers in the service of the Operators to join the I. L. A. (R. 10a-11a).

On December 26, 1951, as a result of the inducement and encouragement of the Operators' employees to strike, the Association of Operators entered into a contract with I. L. A. by the terms of which the engineer officers on the tugboats of the Operators as a condition of their continued employment, are required, within thirty days from January 1, 1952, to become and remain members of I. L. A. Enforcement of this condition was temporarily suspended pursuant to agreement reached in open court in an action brought by M. E. B. A. against I. L. A., the Operators and the Association of Operators to declare the contract of December 26, 1951, illegal, null and void (R. 11a).[1]

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1. The case referred to in the complaint is *Marine Engineers Beneficial Association No. 13 and the individual members thereof v. Tugboat Owners and Operators of the Port of Philadelphia, Curtis Bay Towing Company of Pennsylvania, Independent Towing Company, Inc., P. F. Martin, Inc., Sheridan Transportation Company, Taylor and Anderson Towing and Lighterage Company, Bernard Tuckers Sons, United Marine Division International Long-*

By the acts described the I. L. A. and William V. Bradley did engage in, or did induce or encourage the employees of the Operators to engage in, a strike or a concerted refusal in the course of their employment to perform any services, an object thereof being to force or require employers to join a labor organization, thereby having engaged in and engaging in unfair labor practices within the meaning of Section 8(b)(4)(A) of the Act (R. 11a).

The Board did not hold any hearing on the complaint nor did it progress the complaint through its usual procedures but instead, on May 6, 1952, the I. L. A. and William V. Bradley and Ramey Donovan as counsel for the General Counsel of the National Labor Relations Board, entered into a stipulation in purported settlement of the case, which stipulation was consented to by the Association of Operators, subject to the approval of the National Labor Relations Board (R. 13a-21a). By the terms of the stipulation the I. L. A., William V. Bradley and the Association of Operators admitted service upon them of the charge, amended charge, complaint and notice of hearing thereon, waived the filing of answer, hearing, intermediate report of Trial Examiner, the filing of exceptions and oral argument before the Board, the making of findings of fact or conclusions of law by the Board, and all other procedure before the Board and consented to the entry by the Board of the order set forth in the stipulation (R. 13a-15a).

The order which the stipulation set forth for entry by the Board provided that the I. L. A. and William V. Bradley shall not engage in or induce or encourage a strike for the

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shoremen's Association Local No. 333-A, and William V. Bradley, Civil Action No. 13207, now pending in the District Court of the United States for the Eastern District of Pennsylvania. In that suit the defendants contended that the National Labor Relations Board had exclusive jurisdiction of the subject matter of the suit. All proceedings in that action have been continued pending disposition of the instant case by the Board and courts.

purpose of requiring the Association of Operators to comply with the contract of December 26, 1951, insofar as it applies to engineers or to force or require the marine engineers employed by the Operators to join the I. L. A. or any other labor or any employer organization; shall not enforce the contract of December 26, 1951, insofar as it applies to engineers; and shall not request or demand for a period of sixty days after approval of the stipulation by the Board, that the Operators or the Association of Operators recognize the I. L. A. as the exclusive bargaining representative of marine engineer personnel (R. 15a-16a). The order also made provision for the usual posting of notices and notification to the Regional Director of steps taken in compliance (R. 16a-17a).

The stipulation authorized the Board to apply to any United States Court of Appeals for a decree enforcing the order in the terms set forth and waived all notice and defenses to the entry of such a decree (R. 17a).

The M. E. B. A. was not a party to the stipulation and did not waive any of the procedure before the Board to which it was entitled under the Act, and the Rules and Regulations of the Board, but on the contrary filed objections to the proposed stipulation and brief in support thereof in which it urged the Board not to approve the stipulation but instead to return the case to the General Counsel with leave to him to attempt to secure a stipulation for an appropriate remedy or if that was not possible, to proceed with a hearing and the other usual steps required by the Act and by the Rules and Regulations thereunder (R. 22a). As grounds for its objections to the proposed stipulation the M. E. B. A. alleged that the proposed stipulation did not provide the appropriate remedy to which the M. E. B. A. would have been entitled had the case proceeded through hearing, intermediate report, findings of fact, conclusions of law and order by the Board in that the order provided in the proposed stipulation failed to declare the contract of December 26, 1951 illegal, failed to require its

rescission from its inception and failed to bar its remaking but rather expressly left the I. L. A. free at any time after sixty days again to enter into a contract with the Association of Operators requiring all licensed marine engineer officers to join I. L. A. as a condition of manning tugboats (R. 22a, 24a).

In its objections to the proposed stipulation the M. E. B. A. alleged that it is prepared to offer evidence at any hearing which may be held on the complaint which would establish the facts alleged in the complaint and would show that the I. L. A. by strike action in December 1951 forced the Association of Operators to enter into a contract with the I. L. A. covering the period from January 1, 1952, to January 31, 1953, by the terms of which the licensed marine engineer officers on the tugboats of the Operators are required to join and remain members of the I. L. A. during the period of the contract and that the coercive effect of such conduct will continue in effect throughout the term of the aforesaid contract obtained as a result of such coercive action and well beyond the period during which negotiations for its renewal would normally take place (R. 22a-23a).

In its objections M. E. B. A. further contended that the proposed stipulation leaves the I. L. A. free to enjoy in substantial part the fruits of its unfair labor practices, for unless the I. L. A. is barred by order of the Board from again entering into a contract with the Association of Operators requiring all licensed marine engineer officers to join the I. L. A., the I. L. A. is left free to accomplish the object of its unlawful strike action (R. 23a-25a). The M. E. B. A. also alleged that a contract requiring employers to join a labor organization is inconsistent with the rights of both employees and employers to be free of the interference, restraint or coercion of the other in the exercise of self-organization, collective bargaining and other concerted activity (R. 24a).

Attached to its objections to the proposed stipulation was the order proposed by the M. E. B. A., which contains several provisions in addition to those in the Order set forth in the proposed stipulation, the most important of which were its requirement of rescission from its inception of the contract of December 26, 1951, and its absolute prohibition of the I. L. A.'s again requesting or demanding that the Association of Operators or any member thereof require licensed marine engineer officers to join the I. L. A., any other labor organization, or any employer organization as a condition of their employment (R. 27a-29a).

The Board without affording the M. E. B. A. any oral argument on its objections, and without affording the M. E. B. A. the opportunity to present evidence with respect to the character and effect of the unfair labor practices, on August 15, 1952, entered its decision and order, approving the proposed stipulation (R. 34a-35a). Without making any findings of fact with respect to the unfair labor practices and without stating any conclusions of law, the Board entered an order in words and figures identical with that set forth in the proposed stipulation (R. 34a-40a) and described above.

On September 24, 1952, the M. E. B. A. filed its petition for review in the court below alleging that the Board had deprived the M. E. B. A. of the rights to which it was entitled under the National Labor Relations Act and under the due process clause of the Fifth Amendment to the Constitution of the United States when it entered an order disposing of the complaint issued herein without affording the M. E. B. A. the hearing thereon and other procedural steps provided in the National Labor Relations Act and in the Rules and Regulations issued thereunder when the order entered did not accord the M. E. B. A. the full relief to which it would have been entitled had a hearing been held and the evidence introduced thereat fully supported the M. E. B. A.'s charges and the complaint issued thereon

(R. 41-47). The M. E. B. A. requested that the court set aside the order of the Board and remand the case to the Board with directions to the Board to proceed with a hearing upon the complaint and the other usual steps required by the Act and the Rules and Regulations, with leave to the Board not to hold a hearing if it or its General Counsel is able to secure a new stipulation which would provide the remedy to which the M. E. B. A. believes it is entitled under law (R. 46).[2]

On March 10, 1953, the court below handed down its opinion (R. 50-56) and on April 3, 1953, entered its decree (R. 56-57) setting aside the Board's order and remanding the case to the Board for further proceedings as prayed in the petition for review. The court held that after a complaint issued the charging party was entitled to a hearing unless it consented to the settlement reached by the other parties (R. 52-56).

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2. Subsequent to the filing of the petition for review in the court below, the Board filed a petition for enforcement of the same order in the court below. *N. L. R. B. v. United Marine Division, Local 333-A, I. L. A., A. F. L. et al.*, No. 10,887. Proceedings in that case have been held in abeyance pending disposition of the instant proceeding.

ARGUMENT.

The issue of whether, after a complaint has been issued by the Board, it may properly proceed to enter a final order denying in whole or part the relief sought, without holding a hearing thereon, even though the charging party objects, is undoubtedly one of "obvious importance" (R. 51). However the opinion below is sound, accurate, well reasoned and thorough. The language of the Administrative Procedure Act, the National Labor Relations Act, and the Rules and Regulations issued thereunder, is clear and unambiguous and requires the result reached. Indeed, the Board's own instructions to its staff at all times here material required that the consent of the charging party be secured before a hearing on a complaint could be waived. There are no conflicting decisions under the National Labor Relations Act or any other statute. Accordingly we believe there is no need for review by this Court and we oppose the granting of a writ of certiorari.

1. The Administrative Procedure Act, Section 5 (5 U. S. C. 1005), while encouraging the settlement of cases, grants all parties the right to a hearing and decision to the extent they are unable to agree to another disposition of the case. Section 5(b) thereof provides:

> "The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing and decision upon notice and in conformity with sections 7 and 8."

The court below held that this section of the Administrative Procedure Act was in point and applicable (R. 54-55). The Board in its petition for a writ of certiorari tries to avoid the application of this statute to the case at

bar by arguing that the M. E. B. A. is not a party within the meaning of Section 5(b) of the Administrative Procedure Act (Pet., pp. 21-22). Section 2(b) of that Act (5 U. S. C. 1001(b)) defines the term "party" as used in that Act as follows:

> " 'Party' includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding."

The M. E. B. A. was named as a party by the Board when it issued the complaint and continued throughout the proceedings before the Board to be named as a party to the agency proceeding.[3] This is in accord with the Board's Rules and Regulations which list the person filing the charge as one of the persons both to be named as a party and as entitled of right to be a party.[4]

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3. The caption which appears on the decision and order of the Board as printed in the record (R. 34a), also appeared on complaint, notice of hearing, stipulation and all other papers issued by the Board although the caption has been omitted in the printing of those latter papers in the record.

4. Section 102.8 of the Board's Rules and Regulations, effective March 1, 1951 (29 C. F. R. § 102, *et seq.*) provides that "The term 'party' as used herein shall mean the regional director * * * and any person named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any Board proceeding, including, without limitation, any person filing a charge * * *".

From the outset of the administration of the Act the charging party has been uniformly recognized as one of the parties to the proceeding. The Rules and Regulations, Series 1, as amended, printed 1 N. L. R. B. 1032 et seq., Art. II, Sec. 5: "After a charge has been filed, if it appears to the Regional Director that a proceeding in respect thereto should be instituted, he shall issue and cause to be served upon the respondent and the person or labor organization making the charge (hereinafter referred to as the 'parties to the proceeding' * * *."

2. The National Labor Relations Act clearly contemplates that all Board orders, whether granting relief or denying relief in whole or in part shall be based upon a record made by the holding of a hearing and the receipt of testimony. The Act expressly makes it mandatory upon the Board to incorporate in every complaint which it issues a notice of hearing. Section 10(b) of the Act provides (49 Stat. 453, 61 Stat. 146, 29 U. S. C. 160):

> "Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purpose, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and *containing a notice of hearing* before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint" (emphasis supplied).

Such a notice of hearing accompanied the complaint issued in the instant case (R. 13a).

The Act not only requires a hearing but imposes a duty on the Board to make a written record thereof. Section 10(c) provides:

> "The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board."

The Act further imposes on the Board the duty to state its findings of fact, both when it finds that unfair labor practices have been committed and when it does not so find. In this regard Section 10(c) provides:

> "If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings and shall issue and cause to be served

> on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * * If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint."

The Supreme Court has described the procedures of the Act as basic to a preservation of the rights therein guaranteed. *Republic Aviation Corp. v. N. L. R. B.*, 324 U. S. 793, 799-800, 802.

The making of a record by the holding of a hearing and the writing of a decision explicating the Board's reasons for its orders are essential to judicial review.

In the case at bar this Court has before it no evidence and no findings of fact or conclusions of law with respect to the unfair labor practices alleged. The Board has merely stated that it concludes that the order "will effectuate the policies of the Act" (R. 35a, n. 1). In *Matter of Phelps Dodge Corp.*, 19 NLRB 547, 603, the Board required the reinstatement of certain employees irrespective of whether they had obtained substantially equivalent employment. The Board, as in the case at bar, merely recited that it concluded their reinstatement "will effectuate the policies of the Act." The Supreme Court held that such a statement afforded no proper basis for review. Accordingly it vacated the Board's order in this regard and remanded the case to the Board in order that it could make a record with respect to the point in issue, which would afford a proper basis for judicial review. *Phelps Dodge Corp. v. N. L. R. B.*, 313 U. S. 177, 196-197.

The Supreme Court in cases arising under other statutes has uniformly held that administrative orders must

be set aside and the case remanded for the making of a proper record, where all of the evidence upon which the agency concluded that its order would effectuate the policies of the Act was not reduced to writing and available for court persual. *I. C. C. v. Louisville & Nashville R. Co.*, 227 U. S. 88, 91, 93-94; *United States v. Baltimore & Ohio S. W. R. Co.*, 226 U. S. 14, 20; *Chicago Junction Case*, 264 U. S. 258, 264-265; *Ohio Bell Telephone Co. v. Comm'n*, 301 U. S. 292, 303; *Ashbacher Radio Co. v. F. C. C.*, 326 U. S. 327, 334; cf. *Wilson Inc. v. F. C. C.*, 170 F. 2d 793, 802-803 (App. D. C.).

The National Labor Relations Act does not expressly confer any power upon the Board to settle unfair labor practice cases. The only power it expressly confers upon the Board to issue orders in unfair labor practice cases is the quasi-judicial power to decide issues of law and fact after the traditional type of a hearing in which evidence is received and a record thereof made (Section 10(c)).

At common law the courts deemed it unnecessary to engage in the lengthy and costly processes usually attendant upon litigation whenever all affected parties agreed upon and consented to a judgment. The courts held that under usual principles of contract, waiver and estoppel, the will of the parties afforded the basis for a judgment and obviated the exercise of governmental powers. Indeed, settlements were encouraged at common law, not only because of the saving in time and money but because the resolution of conflicting interests by mutual agreement was preferable to their resolution by the fiat of government, irrespective of the fairness of the hearing and decision. The Board, from the outset of its administration, deemed that its quasi-judicial powers could properly be construed as including the traditional common law power to enter a consent order where both the charging party and the respondent had agreed upon the order which should be entered. The same reasons which motivated common law courts were applicable—the saving in time and money—the better acceptance

of the order by all where it represented the will of both the charged and the charging party rather than the will of a governmental body.[5]

At common law it was well understood that a consent judgment did not represent the judicial determination of a dispute but rather a contractual settlement. The resolution of the conflict had not been by governmental decision of a dispute the parties had been unable to decide. The content of the judgment did not represent an exercise of the power of the court to govern but rather represented a meeting of the minds of all affected in a contract. *Freeman on Judgments,* 5th ed., vol. 3, Secs. 1344, 1350, 1352, pp. 2764, 2773, 2777; *Bank of Glade Spring v. McEwen,* 160 N. C. 414, 76 S. E. 222, Ann. Cas. 1914C 542. In the latter case the court stated (160 N. C. at pp. 426-427):

> "* * * a decree rendered by consent * * * is, in truth, a decree of the parties, and in such a case their will is a sufficient reason for it (*stat pro ratione voluntas*). The court takes no part in the formation of the consent, but merely enters its decree in conformity therewith. But before there can be such a decree, it is absolutely necessary that there should have been a previous consent of the parties to be affected thereby. This constitutes the authority of the court to enter its decree, and is the essential basis of its action."

Since a consent judgment at common law did not represent an adjudication by a court but solely a contract of the parties, any person having an interest in the subject matter of the litigation which was affected by the order, could have it set aside if he did not consent thereto. *Freeman on Judgments,* 5th Ed., Vol. 3, Sec. 1352, p. 2777; *Read v. Davis,* 218 Ark. 76, 234 S. W. 2d 371; *Burnaham v. Heaton,* — Tex. —, 240 S. W. 2d 288; *Deitz v. Bolch,* 209 N. C. 202, 183 S. E 385; *Bank of Glade Spring v. McEwen,* 160 N. C. 414, 423-427, 76 S. E. 222, Ann. Cas. 1914C 542.

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5. See Joseph Rosenfarb, The National Labor Policy and How It Works (1940), p. 518.

The Board has conceived that there was one difference between its position and that of common law courts, namely, that the Board had to protect the public interest in securing compliance with the Act, and hence need not approve a settlement between the charging party and the respondent when it did not appear to afford sufficient protection for the public.

The Board's practices with respect to settlement of cases was described by Joseph Rosenfarb in his book The National Labor Policy and How it Works,[6] pp. 518-519, as follows:

> "The parties to the settlement agreements are the employer, the individual or union bringing the charge, the intervenor, and the board's attorney. * * * The form of the execution of the stipulations is as follows:
>
> "The Smith Company, by Malcolm Smith, President.
>
> "The X Union, by Peter Young, President (or other official).
>
> "John Jones, Attorney, N. L. R. B.
>
> * * *
>
> "Settlements avoid litigation, but they are desirable only if they serve as a procedural short cut to compliance with the act. Because agreements between private parties, as the result of economic compulsion which may intrude itself, may not subserve the enforcement of the public policy of the act, the Board will not recognize them as per se precluding a proceeding under the act. Section 10(a), in providing that the board's power under the act shall not be affected by any agreement, is not limited to agreements between private parties. Hence the settlements entered into

6. Judge Warren Madden in his foreword to this book, p. xxxii, points out that Mr. Rosenfarb writes "from the vantage point of one who has participated" in the administration of the Act.

between the board and the other parties must be in harmony with the act. For instance, a regional director will not advise a compromise which would result in the reinstatement of a discharged employee upon condition of his not belonging to a union, but he would sanction in cases where difficulty may exist in proving the commission of unfair labor practices a compromise which would provide for the reinstatement of discharged employees waiving part or the whole of their back pay. *In any case a settlement is not effected without the consent of the employees and the union involved in the charge.*" (Emphasis supplied.)

None of the cases or extra judicial materials cited by the Board even suggests that the power of any administrative agency to substitute consent orders for adjudicated orders rests on any basis other than the contractual consent of all those affected.

Except for a few years around 1944, the National Labor Relations Board has uniformly required the consent of the charging party to all orders entered without a hearing. The Board's present Statement of Procedure describes its procedures for settlement where a Board order is to be issued as based on the section "The parties agree to waive their right to hearing." (Section 101.9, N. L. R. B. Statement of Procedure, 29 C. F. R., quoted in full in Appendix D, infra, pp. 30-31.) We believe this was meant to describe the Board's understanding that the charging party was entitled to and would be granted a hearing unless the charging party expressly waived hearing. The N. L. R. B. Manual of Practices, Procedures and Policies of January 15, 1944, (a confidential manual for use of the Board's staff and not available to the public, which is quoted and relied upon in the petition for a writ of certiorari, pp. 11, 33-39) is no longer in effect. The subsequent manual issued in 1951 deleted footnote 1 of page 35, of the 1944 Manual which in "exceptional circumstances" made it permissible to conclude a settlement after a complaint issued without

the consent of the charging party and no longer made any provision for a settlement to be effectuated after a complaint issued without the consent of the charging party. The manuals in force at the present time and at all times after 1951 so provide (see pertinent portion of these manuals quoted in Appendix E, *infra*, pp. 24-25).

All of the public records available indicate that it has been the Board's uniform practice to grant the charging party a hearing in every case in which the complaint issued, unless the charging party itself waived the hearing.[7] The Monograph of the Attorney General's Committee on Administrative Procedure of the Board, as well as the Final Report of that Committee, both relied upon by the Board in its petition for a writ of certiorari (pp. 9, 11, 14) reveal that Committee's understanding that all consent orders, which of course issue only in cases where there has been a complaint, rest on the consent of the charging party as well as that of the respondent and any intervenor. Thus the Board (Pet., p. 9) quotes footnote 33 of that Committee's monograph for the proposition that a *pro forma* complaint must issue in all cases where a Board order is to be issued. It omits the following footnote which lists the signatories to such settlement stipulations as generally "the respondent, *the charging party*, the Board's Attorney, the Regional Director, and any intervenor."[8] (Emphasis supplied.)

An examination of the summary of a speech of former Board Chairman J. Warren Madden, now a judge of the United States Court of Claims, quoted from and relied

7. None of the material relied upon by the Board respecting its practices in informal settlements (Pet., pp. 9-17, 31, 35-39) is relevant because by definition an informal settlement is one in a case where no complaint has issued. Admittedly the Board has unlimited discretion not to issue a complaint, which necessarily includes the power to make any disposition it desires of any case in which a complaint has not issued.

8. Atty. Gen. Comm. Ad. Proc., N. L. R. B., S. Doc. No. 10, Part 5, 77th Cong. 1st Sess., p. 8, n. 34.

upon by the Board (Pet., p. 12, n. 4) discloses nothing which would indicate it was either his understanding or the practice of the Board that a case could be settled after complaint issued without the consent of the charging party. Indeed, an examination of summary of the conference which appears in the document cited by the Board for this speech (Conference on Administrative Tribunals under Auspices of American Bar Association, November 13-17, 1939, summarized in 5 LRRM 1163, 1166) shows that the speaker immediately preceding Judge Madden, Thomas E. Kerwin, expressing the employer's point of view, complained of the fact that the Board's power to settle cases "is limited by the fact that three parties must agree to settlement", obviously referring to the Board, the employer and the charging party. (5 LRRM at p. 1165.) Judge Madden said nothing to indicate that Mr. Kerwin misconstrued either the Board's power or practices in this respect.

The quotation of a speech of "another former Board member" which is set out in the Board's petition, pp. 12-13, n. 4, when read in context, shows that the "settlement" there mentioned which Board investigator should not approve was one entered into between the union as the charging party and the employer which despite the union's being a party to the settlement left some of the employees a "belief the Act had been flaunted and damages inadequately repaired." The speech in question was one made by Board Member Edwin Smith before the Harvard Law Students on March 8, 1940, N. L. R. B. Release No. R. 2728. During the earlier portion of his speech he states that 50% of the cases brought to the Board have been "amicably settled between the employer and the complaining union and the representatives of the Board."[9]

Preceding the portion of his speech quoted by the Board, Mr. Smith stated:[10]

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9. P. 7 of N. L. R. B. Release No. R-2728. To the same effect see Rosenfarb, *op. cit.* p. 486.

10. *Ibid.*, pp. 9-11.

"In some instances, and this is the frequent practice in regions which permit easy access to the regional office, almost the first act taken after the charge has been filed is to request a conference at the regional office between the complaining party and the employer. Such conferences are both for elucidation of the facts and to arrange a settlement if there appears to be warrant for going ahead with the case. * * * There is no attempt, of course, to force a settlement upon the employer under threat of hearing. He has his legal rights under the Act and if he chooses to have the case go forward for final adjudication by the Board our agents have no right to dissuade him from this course; all they can do at this stage is to give their personal estimate of the soundness of the case and offer to bring about a settlement which will be *acceptable both to him and the complainant.*

"'* * * *the investigator may believe and have persuaded the employees and the charging union* that the cases of three of the workers are substantial, two of them dubious and one of them weak. If an adjustment of the case is made at that time which results in the restoration of three men to their jobs with back pay, and two without, and no relief for the sixth man, this would represent substantial compliance with the purposes of the Act as of the then established state of facts.

"It might well be that if the case went to hearing the testimony adduced would convince the Board that all six men had been discriminated against * * *

"All of these contingencies come necessarily in the mind of the Board's representative and *the union in considering the desirability of a particular informal settlement.* The Board's agent has a peculiarly delicate responsibility." (Emphasis supplied.)

Then follows the material quoted by the Board (pp. 12-13, n. 4).

In view of this history the court below was entirely accurate in viewing the Board's own practices with regard to requiring the consent of the charging party as affording "quite a little, though not overwhelming proof of the correctness" of the M. E. B. A.'s position (R. 53).

3. The Board's chief basis for seeking review here is its fear of the effect of the decision below as "sharply curtailing the Board's power in this significant area" (Pet., p. 8). This basis for review is completely dissipated by the fact that the Board's own present instructions to its field staff do not authorize them to accept a settlement after complaint issues unless the charging party consents (see present manual quoted Appendix E, pp. 32-35 *infra*). Since the Board has instructed its staff in this fashion, it is clear the decision below has no curtailing effect upon any power it claims to exercise.[11] Rather the decision is fully in accord with the Board's present practices and procedures.

CONCLUSION.

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted

ABRAHAM E. FREEDMAN,
CLIFFORD D. O'BRIEN,
RUTH WEYAND,
Attorneys for Marine Engineers Beneficial Association, No. 13.

July 17, 1953.

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11. The figure of 6 "unilateral" settlements in 1952 after complaint issued, cited by the Board (Pet., p. 14) evidently represents instances in which the staff violated the Board's instructions to them. Such figures afford no basis for any Board plea for recognition of its power to authorize such settlements.

APPENDIX A.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 146, 29 U. S. C. Supp. V, 151, *et seq.*), are as follows:

[SEC.] 8 (b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, when an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization * * *

* * *

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce.

* * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said Complaint * * *. Any such complaint may be amended by the member, agent, or agency con-

ducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. * * *

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * * If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. * * * In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof

upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed. * * *

* * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be

conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall

file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact it supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

APPENDIX B.

The relevant provisions of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. § 1001, *et seq.*) are as follows:

SEC. 2. As used in this Act—

* * *

(b) *Person and party.*—"Person" includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies. "Party" includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding; but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes.

* * *

[SEC.] 5 (b) *Procedure.*—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8.

APPENDIX C.

The pertinent provisions of the Board's Rules and Regulations, Series 6, effective March 1, 1951 (29 C. F. R. § 102, *et seq.*) in effect at the times involved in this proceeding, are as follows:

SEC. 102.8 *Party.*—The term "party" as used herein shall mean the regional director in whose region the proceeding is pending, and any person named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any Board proceeding, including, without limitation, any person filing a charge or petition under the act, any person named as respondent, as employer, or as party to a contract in any proceeding under the act, and any labor organization alleged to be dominated, assisted, or supported in violation of section 8(a)(1) or 8(a)(2) of the act; but nothing herein shall be construed to prevent the Board or its designated agent from limiting any party to participate in the proceedings to the extent of his interest only.

* * *

SEC. 102.38 *Rights of parties.*—Any party shall have the right to appear at such hearing in person, by counsel, or by other representative, to call, examine and cross-examine witnesses, and to introduce into the record documentary or other evidence, except that the participation of any party shall be limited to the extent permitted by the trial examiner, and provided further that documentary evidence shall be submitted in duplicate.

* * *

SEC. 102.51 *Settlement or adjustment of issues.*—At any stage of a proceeding prior to hearing, where time, the nature of the proceeding, and the public interest permit, all interested parties shall have opportunity to submit to the regional director with whom the charge was filed, for consideration, facts, arguments, offers of settlement, or proposals of adjustment.

APPENDIX D.

The pertinent provisions of the Board's Statements of Procedure (29 C. F. R. 101 et seq.), in effect at the times involved in this proceeding, are as follows:

SEC. 101.7 *Settlements.*—Before any complaint is issued or other formal action taken, the regional director affords an opportunity to all parties for the submission and consideration of facts, argument, offers of settlement or proposals of adjustment, except where time, the nature of the proceeding, and the public interest do not permit. Normally prehearing conferences are held, the principal purpose of which is to discuss and explore such submissions and proposals of adjustment. The regional office provides Board-prepared forms for such settlement agreements, as well as printed notices for posting by the respondent. These agreements, which are subject to the approval of the regional director, provide for the withdrawal of the charge by the complainant at such time as the respondent has complied with the terms of the settlement agreement. Proof of such compliance is obtained by the regional director before the case is closed. If the respondent failed to perform his obligations under the informal agreement, the regional director may determine to institute formal proceedings.

* * *

SEC. 101.9 *Settlement after issuance of complaint.*—(a) Even though formal proceedings have begun, the parties again have full opportunity at every stage to dispose of the case by amicable adjustment and in compliance with the law. Thus, after the complaint has been issued and a hearing scheduled or even begun, the attorney in charge of the case and the regional director afford all parties every opportunity for the submission and consideration of facts, arguments,

offers of settlement, or proposals of adjustment, except where time, the nature of the proceeding, and the public interest do not permit.

(b) All settlement stipulations which provide for the entry of an order by the Board are subject to the approval of the Board in Washington. If the settlement provides for the entry of an order by the Board, the parties agree to waive their right to hearing and agree further that the Board may issue an order requiring the respondent to take action appropriate to the terms of the adjustment. Usually the settlement stipulation also contains the respondent's consent to the Board's application for the entry of a decree by the appropriate circuit court of appeals enforcing the Board's order.

(c) In the event the respondent fails to comply with the terms of a settlement stipulation, upon which a Board order and court decree are based, the Board may petition the court to adjudge the respondent in contempt. If the respondent refuses to comply with the terms of a stipulation settlement providing solely for the entry of a Board order, the Board may petition the court for enforcement of its labor, pursuant to section 10 of the National Labor Relations Act.

APPENDIX E.

Excerpt from N. L. R. B. 1951 Manual of practices, procedures, and policies for the guidance of the Board's staff:

10230 Types of Adjustments: Charge cases may be adjusted either by formal or informal adjustments.

1. Informal: Informal adjustments are those which do not provide for the entry of a Board order or of a Board order and consent decree. The informal type of adjustment is adequate where the Regional Director believes that it is the intention of the party charged with the unfair labor practice to not engage in further violation of the Act. It is effected through a simple agreement by the parties, usually before issuance of complaint.

Informal settlement agreements are subject to the Regional Director's signature of approval and need not be submitted to the Division of Operations unless a policy question is involved. (or complaint has issued)

Where a complaint has issued, an informal settlement is permissible, but it must be submitted to the Division of Operations together with a full explanation of why a formal settlement was not achieved. An informal settlement of this nature is subject to the administrative approval of the General Counsel but should not provide for his signature approval. Withdrawal of the complaint may be a term of the agreement or may be accomplished by order of the Regional Director upon receiving approval of the agreement.

Informal settlement need not be submitted for approval. See Bulletin 11-53 changing this procedure in this regard. (See footnote)

If an informal agreement is reached after the hearing has opened, the same requirement of signed approval by the Regional Director and administrative approval of the General Counsel holds true. In such event, the field attorney requests the Trial Examiner to adjourn the hearing to permit consideration of the settlement agreement by the Regional Director and the General Counsel. Upon approval of the settlement, the field attorney makes a motion to the Trial Examiner for permission to withdraw the complaint.

Footnote:

BULLETIN No. 11-53 March 5, 1951
TO: All Regional Directors and Officers-in-Charge
FROM: William O. Murdock, Associate General Counsel
SUBJECT: Informal Settlement Agreements

It will no longer be necessary for Regional Directors to obtain authorization from Washington for approval of informal settlement agreements obtained after the issuance of complaint. Regional Directors should, of course, continue to exercise discretion in approving such agreements to guard against any deterioration in our effectiveness in obtaining settlements at informal states.

W. O. M.

Distribution: Supervisors only
Last Bulletin in this category: 10-53

When an informal settlement is negotiated, it is reduced to writing. In some types of cases there are standard forms which set forth the terms of the settlement (Forms NLRB-551, 552). The printed provisions on these forms represent minimum settlement standards for typical cases.

Additional provisions should be added to the standard forms where necessary to meet particular fact situations.

The party charged with the violation and the charging party ordinarily are both parties to the settlement agreement. Form NLRB-552 is used in Section 8(a) cases where the respondent offers to take affirmative remedial action which the charging party is unwilling to accept but which the Regional Director believes will effectuate the purposes of the Act. This form, however, is to be used sparingly and only after every reasonable effort has been made to persuade the charging party to accept the proferred compliance.

If after the execution of an informal settlement agreement there is noncompliance with its affirmative provisions, the remedy lies in the issuance of a complaint. If there are subsequent violations, new charges may be filed, the original case may be reopened and both cases consolidated for complaint. In either event, the case is tried upon its merits before a Trial Examiner and not upon the matter of noncompliance with the settlement agreement.

2. Formal adjustments are those which result in a stipulation for the entry of a Board order and consent decree, or the entry of a Board order only. Field attorneys always participate in drawing up the stipulation for a formal adjustment of a charge. The parties to the usual settlement stipulation include the party charged with the violation, the charging party, the regional office attorney, and any intervenor in compliance with Section 9(f), (g), and (h) of the Act. The field attorney ordinarily signs the stipulation on behalf of the General Counsel.

Prior to or simultaneous with the signing of a formal settlement stipulation, a complaint is issued and served upon the respondent. All settlement stipulations made after issuance of a complaint which provide for the entry of a Board order and consent decree are subject to the approval of the Board. They are forwarded by the regional office to the Division of Operations for approval of the General Counsel and submission to the Board. For full discussion of formal adjustments and suggested techniques for all types of settlement conferences, see 10270-10299.